

Pursuant to Ind. Appellate Rule 65(D),  
this Memorandum Decision shall not be  
regarded as precedent or cited before  
any court except for the purpose of  
establishing the defense of res judicata,  
collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT:

**DONALD S. SMITH**  
**CHERYL D. FINCHUM**  
Riley Bennett & Egloff, LLP  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

BRUCKER ENTERPRISES, INC.,	)	
d/b/a, BURGER KING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 93A02-0608-EX-637
	)	
JOHN H. KING,	)	
	)	
Appellee-Plaintiff.	)	

---

APPEAL FROM THE INDIANA WORKER'S COMPENSATION BOARD  
Cause No. C-171569

---

**January 10, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Judge**

Appellant-defendant Brucker Enterprises, Inc., d/b/a Burger King (Brucker) appeals

the decision by the Indiana Worker's Compensation Board (Board) that awarded appellee-plaintiff John H. King medical costs and temporary total disability benefits. Specifically, Burger King contends that the Board's ruling reversing the judgment of the single hearing member that denied King benefits cannot stand because the evidence overwhelmingly established that King's hip injuries and recommended surgery were the result of a preexisting condition.

Although the Board failed to issue findings of fact and conclusions in support of its ruling, the only evidence in the record indicated that King's injuries and recommended surgery were the result of his preexisting injury. Thus, we reverse the decision of the Board.

### FACTS

On May 3, 2004, fifty-eight-year-old King was employed as a custodian and broiler operator at a Burger King restaurant. Prior to his employment at Burger King, King suffered from a number of disabilities and medical conditions. King also had undergone left and right hip replacement surgery in 1976, and left and right hip revision surgeries in 1989 and 1990. Since those surgeries, Dr. Robert Colyer examined King on a regular basis. In April 2000, King saw Dr. Colyer and complained of "posterior thigh pain." Appellant's App. p. 13. During that visit, Dr. Colyer determined that King's problems seemed to be "back related," and that he did not appear to be a "revision candidate." Id. Dr. Colyer further advised King to follow up in one year for repeat x-rays of both hips. King saw Dr. Colyer again on August 13, 2003, at which time King complained of mild pain in his right hip. X-rays of both hips revealed that King's prostheses were stable, but there was evidence of some loosening over a

component that had been used in the previous hip replacement and revision surgeries. Dr. Colyer recommended that Dr. King return in two years for repeat x-rays of both hips.

In September 2003, King fell and injured his right side, resulting in persistent pain in his right hip. As a result, King returned to Dr. Colyer on September 17, 2003, for an examination and evaluation. King was walking with a cane, and Dr. Colyer observed that it “may well be that [the component] has become loose enough to cause symptoms.” Id. at 17.

After King’s fall at Burger King on May 4, 2004, the initial injury report indicated that King had tripped on a wet mat as he was walking past a three-compartment sink. The x-rays taken on the day of the accident revealed no change from those that had been taken on August 29, 2003. King next saw Dr. Colyer on May 24, 2004. Dr. Colyer reported that the x-rays obtained on May 24, 2004 did not show any change in position of the prostheses from September 17, 2003. The report specifically stated “there has always been some concern about a loose [component] for a number of years with milder pain, which is now worse.” Id. at 19. Dr. Colyer also determined that King would be a candidate for revision surgery if the pain did not improve.

Sometime after July 21, 2004, Dr. John Meding rendered a second opinion. In an undated report, Dr. Meding diagnosed King with loose right prosthetic components with some wearing or dissolution of the bone around the component. Dr. Meding was of the opinion that King’s right hip condition was tenuous prior to the fall at Burger King and that the fall did not cause the changes to the bone or cause the loose component because they existed prior to the fall.

Another opinion given by Dr. Dean Maar on September 9, 2004, confirmed that King's components had shown slow, yet progressive loosening since at least 1994. Dr. Maar confirmed Dr. Colyer's opinion that the x-rays obtained after the fall did not reveal any changes from the x-rays before the fall. Although King's pain and function had worsened since the May 3, 2004, work injury, Dr. Maar was of the opinion that the loosening component had not changed since the fall. Dr. Maar also concluded that the recommended second revision surgery would have been required "with or without the injury sustained on May 3, 2004." Id. at 32. Indeed, Dr. Maar determined that "very little of the planned hip procedure was directly related to the fall occurring on May 3, 2004." Id.

Thereafter, King underwent an additional revision surgery on May 3, 2005. In accordance with King's application for benefits, a hearing was held before a single hearing member of the Board on March 14, 2006. At the conclusion of the hearing, judgment was entered in favor of Burger King. King's claim for medical costs and benefits was denied in light of his symptomatic preexisting hip conditions. Thus, it was determined that King's injury did not arise in the course of his employment. The single hearing member entered one finding of fact and conclusion of law as follows:

1. Based upon the credible medical evidence as set forth by the report of Dr. Robert Colyer, with a reasonable degree of medical certainty the hip revision which King currently seeks to be paid for by the defendant as a result of his May 3, 2004 accident, the medical condition of King's hip prior to the fall was such that a hip revision was imminent regardless of whether the fall occurred or not.

Id. at 9. Thereafter, King filed his application for review by the Board.<sup>1</sup> Following a hearing, the Board issued an order on July 6, 2006, which provided in its entirety:

The Single Hearing Member entered his Award dated March 21, 2006, which said Award was in the following words and figures, to-wit. . .

It is further found by the majority of the members of the Full Worker's Compensation Board that the Single Hearing Member's decision should be reversed.

It is further found by the Full Worker's Compensation Board that this cause should be and is hereby remanded to the Single Hearing Member and placed on the Marion County docket for further proceedings.

Id. at 6-7. Burger King now appeals.

### DISCUSSION AND DECISION

Before proceeding to the merits of Burger King's arguments, we first note that the Board has a duty to make findings that reveal its analysis of the evidence and the findings must be specific enough to allow an intelligent review of its decision by this court. Shultz Timber v. Morrison, 751 N.E.2d 834, 836 (Ind. Ct. App. 2001). Put another way, the Board's findings must be sufficiently specific to give both parties an understanding of its reasons, and the supporting evidence, for the ultimate finding of fact. Outlaw v. Erbrich Prod. Co., 777 N.E.2d 14, 26 (Ind. Ct. App. 2003). It is then up to the appealing party to show that there is no probative evidence from which the Board could have reasonably concluded as it did. Shultz Timber, 751 N.E.2d at 836. Additionally, Indiana Code section 22-3-4-7 requires the Board to "make an award and file the same with the finding of the facts

---

<sup>1</sup> King's specific allegations challenging the single hearing member's ruling are not included in Burger King's Appendix.

on which it is based.” Wicker v. Cmty Media Group, 717 N.E.2d 596, 599 (Ind. Ct. App. 1999).

We also note that King has failed to file an appellate brief in this case.<sup>2</sup> In such a situation, we do not undertake the burden of developing arguments for the appellee. Applying a less stringent standard of review with respect to showings of reversible error, we may reverse the lower court if the appellant can establish prima facie error. AmRhein v. Eden, 779 N.E.2d 1197, 1205 (Ind. Ct. App. 2002). Prima facie is defined in this context as “at first sight, on first appearance, or on the face of it.” Id. at 1205-06. The purpose of this rule is not to benefit the appellant. Rather, it is intended to relieve this court of the burden of controverting the arguments advanced for reversal where that burden rests with the appellee. Id. at 1206. Where an appellant is unable to meet that burden, we will affirm. Id.

As set forth above, the Board failed to set forth any findings of fact or supporting evidence in this case. In Wicker, the Board also had failed to set forth its findings, and we commented as follows:

We acknowledge that the Board’s approach was inconsistent with IND.CODE § 22-3-4-7 of the Worker’s Compensation Act which provides that the Board “shall make an award and file the same with the finding of the facts on which it is based. . . .” Moreover, on numerous occasions, we have stated that the Board must set out written findings of fact in support of its decision so that we may intelligently review the decision without speculating as to the Board’s rationale. See, e.g., Wayman v. J & S Petroleum, Inc., 694 N.E.2d 767, 770 (Ind. Ct. App. 1998); Jackson v. Cigna/Ford Electronics and Refrigeration Corp., 677 N.E.2d 1098, 1102 (Ind. Ct. App. 1997) (citing Talas v. Correct Piping Co., 275 Ind. 261, 416 N.E.2d 845, 846 (1981) and Perez v. United States Steel Corp., 426 N.E.2d 29, 31 (Ind.1981)). Further, we recently held in Wayman that the Board’s reversal of the Single Hearing Member’s award

---

<sup>2</sup> On December 7, 2007, King filed a “Plaintiff’s Motion for Leave to File a Belated Brief” with this court—nearly sixty-five days after his appellate brief initially became due. We now deny King’s motion.

without issuing any findings left us with “no way to review the Board’s determination as presently written,” and, therefore, we reversed the decision and remanded with instructions to enter specific findings of fact. Wayman, 694 N.E.2d 767, 770 (noting that by disposing of the case in such a way, “the Board thwarted the goals of expeditious and effective review of Board determinations and protection against careless or arbitrary administrative action”).

While we do not condone the Board’s abbreviated disposition of the instant case, which in most instances would warrant reversal and remand, we find that remand would be superfluous here because no speculation as to the Board’s rationale is required. Specifically, we note that the medical evidence indisputably demonstrates that Wicker’s current hip problems are a result of a preexisting injury, that being Perthes’ disease, which has entered its chronic end stage.

Id. at 599-600.

As in Wicker, we once again take issue with the Board’s failure to issue findings in this case. Indeed, under most circumstances, the Board’s failure to enter findings thwarts the goals of effective review and protection against arbitrary administration. We therefore urge the Board to no longer ignore the specific requirements of Indiana Code section 22-3-4-7.

However, notwithstanding the Board’s failure to enter findings in support of its ruling, our independent review of the evidence reveals that the Board’s decision to reverse the single hearing member indisputably leads to a contrary result. As noted above, the single hearing member found that Dr. Colyer’s report reveals that King’s hip revision surgery was imminent regardless of whether he fell at Burger King. Appellant’s App. p. 9. Dr. Meding determined that King’s right hip condition was tenuous before the fall, that the accident certainly did not cause the changes in the bone, and that the accident was not the cause of the loose component. Id. at 27. Rather, the loose prostheses on King’s right hip were the reason for

the second revision surgery that in May 2005. Id. at 21. Dr. Maar also believed that King would have required the revision surgery even if King had not fallen. Dr. Maar specifically pointed out that Dr. Colyer had been contemplating right hip revision surgery for years prior to the May 3, 2004 fall. Id. at 32.

We also note that Dr. Colyer did not believe that the loose prostheses were caused by the fall at Burger King. He was only of the belief that King's present pain complaints were related to the fall. Id. at 21. Drs. Colyer, Meding, and Maar all agreed that the prostheses component had not changed between the September 17, 2003, x-rays and the May 3, 2004, incident. Hence, the undisputed evidence demonstrates that King's prostheses were loose before he fell at Burger King and there was no change after the fall. As a result, the evidence established that the loose prostheses were the reason for King's second revision surgery. That said, the uncontradicted evidence established that King suffered from a preexisting injury. As a result, the single hearing member's denial of King's claim for medical costs and worker's compensation benefits was correct, and the Board erred in reversing that ruling.

The judgment of the Board is reversed.

DARDEN, J., and ROBB, J., concur.